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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MICHAEL CERVANTES, Plaintiff and Respondent, v. ATHENS SERVICES, Defendant and Appellant.	B166523 (Los Angeles County Super. Ct. No. BC289162)

APPEAL from an order of the Superior Court of Los Angeles County, Richard L. Fruin, Jr., Judge. Reversed.

Hill, Farrer & Burrill, Kyle D. Brown, Ronald W. Novotny, and E. Sean McLoughlin for Defendant and Appellant.

Danz & Gerber, Karl Gerber, and Stephen F. Danz for Plaintiff and Respondent.

I. INTRODUCTION

Athens Services, defendant, erroneously sued as Athens Disposal Company, Inc., appeals from an order denying its petition to compel arbitration. We reverse the order.

II. BACKGROUND

Michael Cervantes, plaintiff, a former employee, filed a wrongful termination action against defendant. The complaint alleged: wrongful termination in violation of the Fair Employment and Housing Act (FEHA); wrongful termination in violation of public policy; and intentional infliction of emotional distress.

Defendant filed a petition to compel arbitration. Defendant relied on an "Employment and Trade Secrets Agreement" executed by plaintiff at the outset of his employment. The arbitration clause, which is found in paragraph 8 of the employment agreement, states, "Any claim or controversy that arises out of or relates to the interpretation, application or enforcement of this agreement or any other matter concerning or relating to the employment relationship between the Employer and Employee shall be submitted to final and binding arbitration in accordance with the Labor Arbitration Rules of the American Arbitration Association."

Plaintiff opposed the petition to compel arbitration. He argued the arbitration agreement did not meet the requirements of *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 103-113 (*Armendariz*). He noted that under *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1069, 1076-1081 (*Little*), in addition to FEHA claims, a suit claiming wrongful termination of employment in violation of public policy is subject to the *Armendariz* requirements. Plaintiff relied in part on paragraph 5 of the employment agreement which states in pertinent part: "The Employee acknowledges that certain information may come into his possession which is both confidential and critical to the success of the Employer's business. Employee acknowledges that this information which the Employer has disclosed and which he has had access to is confidential,

proprietary, and trade secret information. . . . Employee agrees that such information shall be maintained in strictest confidence and that he shall not disclose it to any third party. . . . If the Employee reveals, threatens to reveal, or utilizes or threatens to utilize any such information, the *Employee agrees that the Employer shall be entitled to an injunction* restraining him from disclosing or utilizing any such information for any purpose whatsoever. *The right to secure injunctive relief shall not be exclusive, and the Employer may pursue any other remedies that it may have against Employee for breach of this Agreement, including the recovery of damages, including attorneys' fees and costs, resulting to the Employer as a result thereof.*" (Italics added.)

The trial court denied defendant's petition to compel arbitration. The trial court concluded the employment agreement was both procedurally and substantively unconscionable. With respect to substantive unconscionability, the trial court found: plaintiff would incur costs that he would not be required to bear if he were free to bring a court action; allowable discovery was within the unreviewable discretion of the arbitrator; and the agreement was not bilateral in that it allowed defendant, but not plaintiff, to obtain injunctive relief and "other remedies" in a *court* action. The trial court reasoned that an enforceable injunction was obtainable only in a judicial forum; further, defendant could obtain its "other remedies," including damages, in a court action for injunctive relief.

III. DISCUSSION

A. United States Arbitration Act

Defendant contends that the United States Arbitration Act applies. We agree. The undisputed evidence indicates the present arbitration clause is a written provision in a contract involving commerce within the meaning of title 9 United States Code section 2. This is an employment agreement with a company that employs 1,000 employees at its City of Industry site. A solid waste disposal company, defendants' drivers were hauling trash for the City of Los Angeles to a La Puente dumpsite. In addition to waste collection,

transfer, and disposal, defendant provided recycling and street sweeping services. Plaintiff could have been reassigned to another location operated by defendant under the terms of his employment agreement. Plaintiff had entered into a confidentiality agreement because defendant's competitors would benefit from disclosure of certain trade secrets. (9 U.S.C. § 2; *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1120; see *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10-11.) In any event, general state law principles of contract interpretation govern the outcome of this matter. (*Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 475-476; *Perry v. Thomas* (1987) 482 U.S. 483, 492, fn. 9.)

B. Standard of Review

Our resolution of this appeal does not rest on any factual dispute raised by extrinsic evidence offered in the trial court and resolved by the trial court. Contrary to plaintiff's assertions, there is no indication the trial court's decision turned on its resolution of factual issues. Therefore, we review de novo the question whether the arbitration clause is enforceable. (*O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, 273; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174 & fn. 1; *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851.) Ordinary rules of contract interpretation apply to the employment agreement and the arbitration clause thereof. (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 738-739; *Maggio v. Windward Capital Management Co.* (2000) 80 Cal.App.4th 1210, 1214.)

C. *Armendariz*

Where a mandatory agreement to arbitrate exists between an employer and an employee, the arbitration of claims for wrongful termination in violation of the FEHA and public policy is subject to certain minimum requirements including: neutrality of the arbitrator; adequate discovery; a written decision permitting limited judicial review; and

limitations on the imposition of arbitration costs. (*Little, supra,* 29 Cal.4th at pp. 1069, 1076-1081; *Armendariz, supra,* 24 Cal.4th at pp. 103-113.)

1. Adequate Discovery

The Supreme Court has held that adequate discovery is indispensable for the vindication of FEHA claims; an employee arbitrating a FEHA claim is entitled to sufficient discovery "including access to essential documents and witnesses, as determined by the arbitrator[s] and subject to limited judicial review pursuant to Code of Civil Procedure section 1286.2" (*Armendariz, supra,* 24 Cal.4th at p. 106); absent a specific contractual provision to the contrary, it is inferred that "when parties agree to arbitrate statutory claims, they also implicitly agree . . . to such procedures as are necessary to vindicate that claim . . ." (*id.* at p. 106); an employer, "by agreeing to arbitrate [a] FEHA claim," impliedly consents to discovery adequate to vindicate the statutory claim (*ibid.*); and the *Armendariz* discovery requirements as to FEHA claims are equally applicable to allegations of wrongful termination in violation of public policy. (*Little, supra,* 29 Cal.4th at pp. 1069, 1076-1081.)

The arbitration clause at issue here is silent as to discovery. However, pursuant to that clause, the Labor Arbitration Rules of the American Arbitration Association apply. Defendant has cited to the American Arbitration Association's "National Rules for the Resolution of Employment Disputes." However, the arbitration clause specifically refers to the "Labor Arbitration Rules." The Labor Arbitration Rules effective December 1, 2002, contain no specific provision as to discovery. Nothing in either the arbitration clause or the applicable rules are contrary to the requirement of discovery adequate to vindicate plaintiff's wrongful termination claims. (See *Little, supra,* 29 Cal.4th at p. 1081 ["Nor is it evident from the agreement that Little will be unable to obtain adequate discovery"].) Moreover, under *Armendariz,* defendant impliedly consented to a discovery procedure adequate to vindicate plaintiff's wrongful termination claims; further, the arbitrator's exercise of discretion as to allowable discovery is subject to limited judicial

review pursuant to Code of Civil Procedure section 1286.2. (*Armendariz, supra,* 24 Cal.4th at p. 106; *Mercuro v. Superior Court, supra,* 96 Cal.App.4th at p. 182.) Therefore, the present arbitration agreement does not violate the *Armendariz* mandate as to discovery.

2. Costs

With respect to arbitration costs, the Supreme Court in *Armendariz* stated: "We . . . hold that a mandatory employment arbitration agreement that contains within its scope the arbitration of FEHA claims impliedly obliges the employer to pay all types of costs that are unique to arbitration. Accordingly, we interpret the arbitration agreement in the present case[, which is silent as to costs,] as providing, consistent with the above, that the employer must bear the arbitration forum costs." (*Armendariz, supra,* 24 Cal.4th at p. 113.) In *Little, supra,* 29 Cal.4th at page 1084, the Supreme Court explained that, "*Armendariz* . . . categorically imposes costs unique to arbitration on employers when unwaivable rights pursuant to a mandatory employment arbitration agreement are at stake." Moreover, the Supreme Court concluded: "[A]n agreement to arbitrate a claim of wrongful termination contrary to public policy must be interpreted to implicitly include an agreement to proportion costs in a manner that is reasonable for the employee/claimant, in order to prevent the de facto waiver of unwaivable rights . . . . Code of Civil Procedure section 1284.2's default provision does not compel a contrary conclusion." (*Id.* at pp. 1080-1081.)

The arbitration agreements at issue in both *Armendariz* and *Little* were silent as to costs. However, both agreements incorporated the California Arbitration Act (Code Civ. Proc., § 1280 et seq.), including section 1284.2, which requires each party to pay a pro rata share of arbitration costs unless the agreement provides otherwise. (*Little, supra,* 29 Cal.4th at pp. 1069-1070, 1080; *Armendariz, supra,* 24 Cal.4th at pp. 92, 107, 112-113.) The Supreme Court held Code of Civil Procedure section 1284.2 did not preclude the judicial imposition of the cost-shifting requirement set forth in *Armendariz.* (*Little, supra,* 29 Cal.4th at p. 1080; *Armendariz, supra,* 24 Cal.4th at pp. 111-112.) Rather, the Supreme

Court held an agreement that the employer would bear the arbitration forum costs would be inferred. (*Little, supra,* 29 Cal.4th at pp. 1081-1082; *Armendariz, supra,* 24 Cal.4th at p. 113.)

The arbitration clause at issue in the present case is likewise silent as to the imposition of arbitration costs. The Labor Arbitration Rules of the American Arbitration Association contain provisions imposing costs on the parties. (Labor Arbitration Rules of the American Arbitration Association, eff. Dec. 1, 2002, rules 21, 43, 44, and Administrative Fee Schedule.) Notwithstanding those provisions, pursuant to *Armendariz* and *Little,* the present arbitration clause impliedly obligates defendant to pay the costs unique to arbitration. (*Little, supra,* 29 Cal.4th at pp. 1081-1082; *Armendariz, supra,* 24 Cal.4th at p. 113.) Moreover, neither the absence of specific cost provisions in the arbitration clause, nor the existence of conflicting rules as to costs, are grounds for denying enforcement of the arbitration agreement. (*Little, supra,* 29 Cal.4th at p. 1084; *Armendariz, supra,* 24 Cal.3d at pp. 111-113.) Any provision of the arbitration rules that imposes on plaintiff the duty to pay costs unique to arbitration is severable and unenforceable. (*Little, supra,* 29 Cal.4th at p. 1075; *McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, 102.) It follows that the parties' agreement is not unenforceable because its terms may impose costs unique to arbitration on plaintiff.

3. Mutuality

The Supreme Court "briefly recapitulate[d]" unconscionability principles in *Little, supra,* 29 Cal.4th at pages 1071 to 1072, as follows: "[T]he [unconscionability] doctrine has '"both a 'procedural' and a 'substantive' element," the former focusing on "'oppression'" or "'surprise'" due to unequal bargaining power, the latter on "'overly harsh'" or "'one-sided'" results.' (*Armendariz, supra,* 24 Cal.4th at p. 114.) The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, '"which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject

it.'" (*Id.* at p. 113.) '[I]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement.' (*Id.* at p. 115.) . . . [¶] Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided. One such form, as in *Armendariz,* is the arbitration agreement's lack of a '"modicum of bilaterality,"' wherein the employee's claims against the employer, but not the employer's claims against the employee, are subject to arbitration. (*Armendariz, supra,* 24 Cal.4th at p. 119.)" That is, as the Supreme Court held in *Armendariz,* if the arbitration agreement, without reasonable justification, "requires one contracting party, but not the other, to arbitrate all claims arising out of the same" occurrence, it is unconscionable. (*Armendariz, supra,* 24 Cal.4th at pp. 117-120.)

As noted above, paragraph 5 of the employment agreement addresses confidentiality and trade secrets. That paragraph states in part: "The Employee acknowledges that certain information may come into his possession which is both confidential and critical to the success of the Employer's business. Employee acknowledges that this information which the Employer has disclosed and which he has had access to is confidential, proprietary, and trade secret information. . . . Employee agrees that such information shall be maintained in strictest confidence and that he shall not disclose it to any third party. . . . If the Employee reveals, threatens to reveal, or utilizes or threatens to utilize any such information, the *Employee agrees that the Employer shall be entitled to an injunction* restraining him from disclosing or utilizing any such information for any purpose whatsoever. *The right to secure injunctive relief shall not be exclusive, and the Employer may pursue any other remedies that it may have against Employee for breach of this Agreement, including the recovery of damages, including attorneys' fees and costs, resulting to the Employer as a result thereof.*" (Italics added.) Nowhere in the agreement is there any language that grants defendant the authority to seek an injunction in a court of law.

Plaintiff contends paragraph 5 of the employment agreement is unconscionably one-sided and unenforceable in that it exempts the employer from the arbitration requirement as to injunctive relief and damages for the employee's breach of the promise to maintain in strict confidence confidential, proprietary, and trade secret information. We disagree. By its plain terms, paragraph 5 of the employment agreement sets forth the employer's *remedies* for the employee's breach of the confidentiality agreement. It says nothing, expressly or impliedly, about the *forum* in which those remedies may be pursued. The language cannot reasonably be construed, as plaintiff asserts, to equate defendant's ability to pursue "remedies" with a right to "utilize all remedies afforded by the court system." The injunction paragraph does not even refer to the court system much less confer on defendant the authority to use the judicial forum to pursue equitable relief. Nor is the language in paragraph 5 ambiguous. Further, paragraph 8 of the employment agreement expressly addresses the forum issue stating, "*Any claim or controversy* that arises out of or relates to the interpretation, application or enforcement of this agreement or any other matter concerning or relating to the employment relationship between the Employer and Employee shall be submitted to final and binding arbitration . . . ." (Italics added.) Hence, paragraph 5 of the employment agreement cannot be read as permitting the employer to pursue its breach of confidentiality remedies in a court of law. (Compare *O'Hare v. Municipal Resource Consultants, supra,* 107 Cal.App.4th at pp. 271, 273-279 [arbitration agreement *specifically allowed* employer to file a lawsuit against the employee and did not compel employer to arbitrate]; *Mercuro v. Superior Court, supra,* 96 Cal.App.4th at pp. 172, 175-176 [arbitration agreement *specifically excluded* claims for injunctive or other relief for unauthorized disclosure of confidential information]; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1528, 1536-1542 [same]. Further, the arbitrator can award permanent injunctive relief. (*O'Hare v. Municipal Resource Consultants*, *supra,* 107 Cal.App.4th at p. 278; see *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 32; *Swan Magnetics, Inc. v. Superior Court* (1997) 56 Cal.App.4th 1504, 1511; compare *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1079-1088 [statutory injunctive relief designed to protect public not

arbitrable].) Moreover, the arbitration award can be confirmed as a judgment of the superior court. (Code Civ. Proc., § 1285; *O'Hare v. Municipal Resource Consultants, supra,* 107 Cal.App.4th at p. 278.) We conclude that paragraph 5 of the arbitration agreement is not unfairly one-sided.

IV. DISPOSITION

The order denying the petition to compel arbitration is reversed. Upon issuance of the remittitur, the petition to compel arbitration is to be granted subject to the analysis in the body of this opinion concerning the imposition of costs unique to arbitration on plaintiff. Defendant, Athens Services, is to recover its costs on appeal from plaintiff, Michael Cervantes.

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TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.